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IN THE

Supreme Court of the United States

THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, PAUL MICHAEL LYNCH, and WILLIAM C. VAN BUSKIRK,

Petitioners,

v.

ASHER RUBINSTEIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

G. PHILLIP SHULER
Counsel of Record
JULIE D. LIVAUDAIS
DOUGLAS L. GRUNDMEYER
RICHARD B. RAMIREZ
CHAFFE, MCCALL, PHILLIPS, TOLER & SARPY, L.L.P.
Attorneys for Petitioners
1100 Poydras Street
Suite 2300
New Orleans, LA 70163-2300
(504) 585-7000

163226

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

143 pp

QUESTIONS PRESENTED

This petition presents the following questions for this Court's review concerning the evidence required to prove liability and damages in a retaliation action under 42 U.S.C. § 2000e-3(a) of Title VII:

1. Whether the Fifth Circuit's opinion, which affirmed the district court's judgment applying a "mixed-motive" analysis under a separate statutory provision, 42 U.S.C. § 2000e-2(m), conflicts with decisions of other circuits holding that statute to be inapplicable to retaliation claims.

2. Whether the defendant-employer is entitled to a judgment of dismissal as a matter of law where the jury found, and objective evidence in the record conclusively reveals, that it had legitimate, non-retaliatory reasons for denying an annual raise to the plaintiff-employee, who was not entitled to receive a raise under the employer's lawful criteria.

3. Whether punitive damages are recoverable as a matter of law from an employer whom the jury found to have legitimate, non-retaliatory grounds for its employment decision.

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Petitioners, The Administrators of The Tulane Educational Fund, Paul Michael Lynch, and William C. Van Buskirk, respectfully ask this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion, No. 98-30777, is reported as *Rubinstein v. Administrators of Tulane Educational Fund*, 218 F.3d 392 (5th Cir. 2000), and reprinted in Appendix A hereto. The relevant orders and reasons, jury verdict, judgment, and post-judgment order of the United States District Court for the Eastern District of Louisiana that were the subject of the Fifth Circuit's review are reprinted in Appendices B through G. The district court's Order and Reasons for its partial summary judgment dated March 6, 1998 (Appendix F) is reported as *Rubinstein v. Administrators of Tulane*, 58 F. Supp. 2d 702 (E.D. La. 1998), but its other rulings (Appendices B through E) are unpublished.

STATEMENT OF JURISDICTION

The Fifth Circuit entered its judgment on July 6, 2000 and denied the parties' timely petitions for panel rehearing and *en banc* rehearing on August 14, 2000. *See* Appendix H at pp. 104a-105a, *infra*. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. § 1981a(b)(1), 42 U.S.C. § 2000e-2(m), 42 U.S.C. § 2000e-3(a), and 42 U.S.C. § 2000e-5(g)(2)(B). The pertinent texts of these federal statutory provisions are set forth in Appendix I at pp. 106a-109a, *infra*.

STATEMENT OF THE CASE

A. Proceedings Below

Asher Rubinstein, an Associate Professor of Mechanical Engineering at Tulane University, sued Tulane (his employer), Paul Michael Lynch (his Department Chair), and William C. Van Buskirk (his Dean) in the United States District Court for the Eastern District of Louisiana, alleging that the defendants had discriminated against him on the basis of his national origin and religion as a Russian Jew and had retaliated against him in violation of Title VII and Louisiana law (R.1, 272-77). Jurisdiction vested in the district court under 28 U.S.C. § 1331 (federal question jurisdiction) and § 1367 (supplemental jurisdiction).

After the district court granted partial summary judgments of dismissal (Appendices E and F), Rubinstein's sole remaining claim under Title VII asserted that the defendants had denied him a pay raise for the academic year 1997-98 in alleged retaliation for his protected activity of filing an EEOC charge and a lawsuit. Although Tulane presented summary judgment evidence that it had valid, non-discriminatory reasons for the raise denial and that Rubinstein had failed to come forward with evidence from which a reasonable jury could find that Tulane would not have taken the same action despite any alleged retaliatory motive, the district court refused to dismiss the claim. *See* Appendix D. The court concluded that even if Tulane "had several legitimate, non-discriminatory motives for denying plaintiff a pay raise . . . that fact alone would not bar the availability of all relief to the plaintiff if the plaintiff were to prove that one motive was retaliatory." *Id.* at p. 41a. Although Rubinstein relied on 42 U.S.C. § 2000e-3(a), which

prohibits employers from discriminating against employees who file EEOC claims, the court looked to 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), which afford limited recovery to an employee who demonstrates that discrimination motivated the employer's practice even though other factors motivated it as well. *Id.* at pp. 39a-40a. The court stated that "the limited remedies available in Sections 2000e-2(m) & 2000e-5(g)(2)(B) apply with equal veracity to retaliation claims." *Id.* at p. 41a.

The case proceeded to trial. Over Tulane's objections, the district court instructed the jury on a "mixed-motive" analysis under 42 U.S.C. § 2000e-2(m) and 2000e-5(g)(2)(B) and submitted a jury verdict form to that effect.[1] *See* Appendix G. The jury found that Rubinstein's filing of a discrimination lawsuit and/or EEOC charge was a motivating factor in Tulane's decision to deny him a pay raise in 1997-98, that Tulane also had a legitimate, non-retaliatory motive for the raise denial, and that Tulane would not have made the same decision to deny Rubinstein a raise despite the existence of a retaliatory motive. *Id.* at pp. 101a-102a. The jury awarded Rubinstein $2,500.00 in lost wages and benefits, zero recovery for emotional damage, and

1. The transcript of the district court's jury charges and Tulane's objections to the instructions and interrogatories are missing from the record. But based on the parties' suggested jury instructions and the district court's verdict form, the Fifth Circuit assumed that the district court had given a mixed-motive charge to the jury and that Tulane had objected. The court's reliance on a mixed-motive theory under 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B) is likewise evident from its pretrial ruling denying Tulane's motion for summary judgment (Appendix D), and the judge's statement on the record during trial that she was overruling Tulane's objections to the proposed charges "for the reasons assigned in the order and reasons of two weeks ago." (Tr. Vol. III, p. 468).

$75,000 in punitive damages. *Id.* at pp. 102a-103a. After entering judgment (Appendix C), the district court denied defendants' motions for judgment as a matter of law and new trial, granted Rubinstein's motion to alter or amend, and ordered Tulane to instate a 3.5% increase in his salary (Appendix B).

On appeal, the Fifth Circuit affirmed the district court's discovery rulings, summary judgment, denial of emotional damages, jury instructions and interrogatories, and denial of Tulane's motion for judgment as a matter of law (Appendix A). But the court of appeals reduced the $75,000 punitive damage award to $25,000 and remanded that issue alone to the district court to give Rubinstein an opportunity either to accept the remittitur or to proceed to a new trial solely on the issue of punitive damages. *Id.* On August 14, 2000, the Fifth Circuit denied defendants' and plaintiff's timely applications for panel and *en banc* rehearing. *See* Appendix H. Rubinstein has since elected to accept the remittitur, and the court has stayed further proceedings pending the outcome of this writ petition.

B. Statement of Facts

In a memorandum to the faculty in advance of raise decisions for the 1997-98 academic year, William C. Van Buskirk, the Dean of Tulane's School of Engineering, explained that much of the limited funds available would be used to redress "current inequities" and "address the problem . . . with the salaries of full professors and some of our associate professors" paid below the national average. *See* Appendix J, pp. 110a-111a. He cautioned that "well-paid associate professors should anticipate little or no raise." *Id.* at p. 111a. Rubinstein's salary was 5% higher than that

of the average Associate Professor of Engineering at Tulane and 9.9% above the national average, which qualified him as a "well-paid associate professor" (R.10, 2000).

Dean Van Buskirk's memo further stated that "raises will be based on merit" and would reward "high-quality performance." *See* Appendix J, p. 110a. The School's stated qualifications for promotion provide that no faculty member with marginal proficiency in teaching effectiveness will be judged favorably (R.2, 364). Rubinstein had a long history of poor teaching performance (R.10, 33, 36-37; R.11, 374-75, 380). In the prior semester, he admittedly ranked second lowest of the entire engineering faculty in teaching evaluations: "I was rated on the bottom; like, I was 51 out of 52." (R.10, 120). Citing Rubinstein's problems as a teacher, Paul Michael Lynch, the Department Chair, did not recommend a raise for Rubinstein in 1997-98 (Def. Ex. 11). He characterized Rubinstein as a "well-paid associate professor" with poor performance as a teacher, who warranted no raise in light of the restrictions on that year's pool (Supp.R. 30, 46-47).

Rubinstein had previously filed an EEOC charge against Tulane in December 1994 and this lawsuit in October 1995 alleging other claims under Title VII. As proof of the alleged retaliation against him concerning the 1997-98 raise denial, he cited Dean Van Buskirk's remark in deposition testimony in June 1997 that a "good colleague . . . uses the resources of the community to resolve differences . . . [and] doesn't haul colleagues into court. . . ." But the Dean had already sent his raise recommendation to the University Provost in April 1997, before his deposition. Moreover, as the Dean explained, in that testimony he was referring to a defamation lawsuit that Rubinstein had filed in state court against a fellow

professor without first using the University's internal grievance procedures (Supp.R., 80-84). The Dean further testified that Tulane officials had set limits on the annual raise pool for 1997-98, that Rubinstein did not receive a raise that year because the limited pool was dedicated to full professors who were compensated below average, and that Rubinstein's teaching effectiveness was in the bottom 20% of the School based on a five-year average (Supp.R. 87-88).

The Fifth Circuit recognized that Tulane had a policy to use the limited raise pool in 1997-98 to remedy pay inequities among the faculty members of the School of Engineering, that Rubinstein's salary was well above both Tulane's and the nation's averages, that merit raises were unavailable to individuals with poor teaching records, and that the record "is replete with evidence of Rubinstein's poor teaching evaluations." *See* Appendix A, pp. 5a, 11a-12a. In affirming summary judgment dismissing Rubinstein's other claims concerning earlier pay raise and promotion decisions, the Fifth Circuit stated that "Tulane's non-discriminatory purpose in denying pay raises based on Rubinstein's poor teaching skills is not rebutted," and further noted "overwhelming evidence that . . . Rubinstein received substantially lower evaluations than other, similarly situated professors." *Id.* at p. 12a.

Both Van Buskirk and Lynch categorically denied that Rubinstein's EEOC charge and lawsuit were in any way a factor in the raise decision concerning him in 1997-98 (Supp.R. 50, 88). Another associate professor of Mechanical Engineering at Tulane, who had also filed an EEOC charge and lawsuit, in fact received a 4.7% raise that year because his salary was well below the national and School averages (*id.* at 88). Nevertheless, the Fifth Circuit found that the Dean's remark in deposition was direct evidence of illegal retaliation against Rubinstein. *See* Appendix A, pp. 16a-17a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case to insure the uniformity of jurisprudence between the circuits and to uphold this Court's own evidentiary standards for proving liability and damages in cases alleging retaliation in employment under Title VII.

I. A Clear Conflict Exists Between the Circuits

Rubinstein's alleged claim for retaliation in employment arises under 42 U.S.C. § 2000e-3(a) of Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating "against any of his employees . . . because he has made a charge . . . under this subchapter." Citing this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993), the Fifth Circuit recognizes in its opinion that a Title VII plaintiff must prove not only that the employer's proffered reasons for its action are pretextual but also that the defendant intentionally discriminated or retaliated against him. *See* Appendix A, pp. 15a-16a. As this Court recently reiterated, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2160 (2000), *citing Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Even where the plaintiff produces direct evidence of discrimination, the defendant is not liable for discriminatory action if it can demonstrate that the plaintiff would have suffered the same adverse employment decision based upon other legitimate, non-discriminatory reasons. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

"In order to prove a Title VII violation (and thereby recover any relief) based on retaliation, *Price Waterhouse* still requires retaliation plaintiffs to establish that the alleged discrimination was the 'but for' cause of a disputed employment action." *McNutt v. Board of Trustees of University of Illinois,* 141 F.3d 706, 709 (7th Cir. 1998).

On the other hand, a post-*Price Waterhouse* amendment to Title VII, 42 U.S.C. § 2000e-2(m), Section 107 of the Civil Rights Act of 1991, provides that a complainant establishes an unlawful employment practice by demonstrating "that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *See Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994) (noting that "§ 107 responds to *Price Waterhouse* . . . by setting forth standards applicable in 'mixed motive' cases;"). Another provision, 42 U.S.C. § 2000e-5(g)(2)(B), sets forth the elements of recovery upon proof of a violation of § 2000e-2(m).

Every circuit court that has considered the issue before this case has concluded that the clear language of Section 107 precludes a court from applying the "mixed-motive" theory of § 2000e-2(m), and its corresponding remedies, to retaliation claims under § 2000e-3. *See Woodson v. Scott Paper Co.*, 109 F.3d 913, 933-35 (3d Cir.), *cert. denied*, 522 U.S. 914 (1997) (Section 107 amended only § 2000e-2, which prohibits discrimination based on race, religion and national origin and specifically does not mention the retaliation provision, § 2000e-3; "We thus must be guided by plain meaning, and we conclude that § 107 does not apply to retaliation cases."); *Tanca v. Nordberg,* 98 F.3d 680, 684 (1st Cir. 1996) ("[T]he mixed motive provisions of section

107 of the 1991 Act do not apply to Title VII retaliation claims brought under section 2000e-3."); *McNutt v. Board of Trustees of the University of Illinois*, 141 F.3d 706, 709 (7th Cir. 1998) ("Discrimination based on retaliation — prohibited separately by § 2000e-3(a) — is conspicuously absent from the list of protected categories in § 2000e-2(m)."); *Kubicko v. Ogden Logistics Services*, 181 F.3d 544, 552 n.7 (4th Cir. 1999) (citing *McNutt*, *Woodson*, and *Tanca* and noting that "[e]ach [sister circuit] relied on the absence of the term 'retaliation' in 42 U.S.C. § 2000e-2(m) for its holding. We find their logic persuasive, and therefore, join them in holding that § 107(a) of the Civil Rights Act of 1991 does not apply to retaliation claims."); *Norbeck v. Basin Elec. Power Co-Op*, 215 F.3d 848, 852 (8th Cir. 2000) (citing *McNutt*, *Kubicko*, *Woodson*, and *Tanca* and noting that "[t]he other circuits that have addressed the question have similarly relied on the plain language of the statute [42 U.S.C. § 2000e-2(m)] and declined to extend it to plaintiffs in dual motive retaliation cases. . . . We find this analysis persuasive. . . ."). *See also Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1304-05 (11th Cir. 2000) ("We hold that 42 U.S.C. § 2000e-5(g)(2)(B) does not apply to mixed-motive retaliation claims under the ADEA. . . . Retaliation prohibited by the ADEA under 29 U.S.C. § 623(d) . . . is not among the unlawful employment practices listed in 42 U.S.C. § 2000e-2(m).").

A. The District Court Erroneously Applied A Mixed-Motive Analysis Under § 2000e-2(m) to This Retaliation Claim Under § 2000e-3(a)

Despite this settled law, the district court cited § 2000e-2(m) and erroneously concluded that Rubinstein could prevail on a mixed-motive theory and recover by simply

showing that Tulane had a retaliatory motive for denying him a pay raise, even though it also had a legitimate reason for its decision:

> In the present case, defendants argue that they had several legitimate, non-discriminatory motives for denying plaintiff a pay raise. Although this may well be true, that fact alone would not bar the availability of all relief to the plaintiff if the plaintiff were to prove that one motive was retaliatory.

See Appendix D, p. 41a. As support for this approach, the district court solely relied on the reasoning of *de Llano v. North Dakota State University*, 951 F. Supp. 168 (D.N.D. 1997), which applied 42 U.S.C. § 2000e-2(m) to retaliation claims under § 2000e-3(a). *Id.* As noted above, the Eighth Circuit in *Norbeck v. Basin Elec. Power Co-Op*, *supra*, has since rejected *de Llano*'s analysis.

Even though it recognized the First, Third, and Seventh Circuits' decisions in *Woodson*, *Tanca*, and *McNutt*, cited above, which hold that the mixed-motive provisions of 42 U.S.C. § 2000e-2(m) do not apply to Title VII retaliation claims, the court of appeals declined to "decide a matter of first impression" in the Fifth Circuit upon concluding that this case did not present the issue clearly and that the district court's error, if any, was "harmless." *See* Appendix A, pp. 19a-20a. But the Fifth Circuit's refusal to correct the district court's reversible error in misapplying a mixed-motive law to this case has effectively sanctioned such an approach and has created a decision that will surely be cited for that proposition. Unless corrected, the judgments below not only adversely affect Tulane's substantial rights

in this case but pose a conflict between the circuits that is likely to recur and bedevil other litigants and courts. This case squarely presents the issue for certiorari review, and the Court should address it.

B. The Error Is Prejudicial, Not Harmless

The relevant inquiry under the harmless error standard is "whether the error itself had substantial influence" on the jury, not simply whether there was enough evidence to support the result. *O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995), citing *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946). Contrary to the Fifth Circuit's view, the district court reversibly erred in misapplying the mixed-motive analysis of § 2000e-2(m). Far from being harmless, that error went to the heart of Rubinstein's burden of proof and necessarily influenced and affected the verdict in a substantial way to the prejudice of Tulane.

Despite Tulane's motion for summary judgment, suggested jury instructions and interrogatories, and objections, the district court effectively charged the jury that Rubinstein was entitled to recover in some form or another simply by proving that retaliation for filing his EEOC charge or this discrimination suit was "a" motive for Tulane to deny him a pay raise. Over Tulane's objections, the district court gave instructions and a verdict form (Appendix G) that asked the jury to decide in Interrogatory No. 1 whether "a motivating factor" for denying Rubinstein the raise had resulted from his "discrimination lawsuit and/or EEOC charge" and in Interrogatory No. 2 whether Tulane "also" had a "legitimate, non-retaliatory motive for the denial." Interrogatory No. 3 then inquired whether Tulane would have made the "same" decision to deny him a raise

"despite the existence of a retaliatory motive," instead of asking the jury whether Rubinstein had proved ultimately that he qualified for and would have received a raise without the alleged retaliation. Depending on the answer, the form instructed the jury to award damages or allow the court to assess the elements of recovery.

The hybrid, "mixed-motive"/"but-for" interrogatory form, which derived from the court's misapplication of 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), undoubtedly confused the jury about Rubinstein's burden of proof. The district court's analysis, which is at odds with the language of Title VII and the prevailing law on the issue in all the other circuits effectively relieved Rubinstein of his required burden to prove pretext and "but-for" causation under *Reeves*, *Hicks*, and *Price Waterhouse*. That error necessarily affected Tulane's "substantial rights" as a defendant in this action under Title VII within the meaning of 28 U.S.C. § 2111 and Fed. R. Civ. P. 61. At a minimum, "one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos*, 328 U.S. at 765. Because at the very least "grave doubt" exists that the error did not affect the jury in this case, it is not "harmless." *Id.*

These reversible errors deprived Tulane and the other defendants of their substantial right to a fair trial based on the applicable law and changed the result. If defendants were not entitled to a dismissal as a matter of law for the reasons that follow, then alternatively they are entitled to a remand for a new trial.

II. Rubinstein's Evidence of Retaliation Was Legally Insufficient Under the Proper Legal Standard

Under Fed. R. Civ. P. 50, a court should render judgment as a matter of law on an issue when no legally sufficient evidentiary basis exists for a reasonable jury to find for a party on that issue after a full hearing. *Reeves*, 120 S. Ct. at 2109. Although it should review the entire record and must disregard evidence favorable to the moving party that the jury is not required to believe, the court should still give credence to uncontradicted and unimpeached evidence from disinterested witnesses that supports the moving party. *Id.* In a Title VII case, the relevant factors "include the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." 120 S. Ct. at 2108.

To avoid judgment as a matter of law in a Title VII retaliation case, the Fifth Circuit itself recognizes that a plaintiff must first establish a *prima facie* case by showing that he engaged in a protected activity, that the employer took adverse action, and that a causal link exists between the protected activity and the adverse action. *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998). Once the employer successfully articulates a legitimate, nondiscriminatory explanation for the alleged adverse employment action, the burden then shifts back to the plaintiff who must demonstrate **both** that "the proffered reason is a pretext for retaliation" **and** that the adverse employment action would not have occurred "*but for*" his protected conduct. *Id.* at 1122-23; *McDaniel v. Temple Independent School Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985).

As a matter of law, Rubinstein failed to carry his ultimate burden of proving that Tulane's reasons for the raise denial were pretextual and that he would have received a merit raise in 1997-98 "but for" Tulane's alleged retaliation. Because objective evidence reveals that his salary was already above average and that his teaching performance was poor, Rubinstein cannot establish that he qualified for and would have received a raise that year according to Tulane's valid criteria. Under the proper legal standard, Tulane is entitled to a dismissal of his claim as a matter of law.

A. The Jury Found No Pretext

Rubinstein failed to establish that Tulane's articulated reasons for denying him a raise — salary inequities among the faculty and his demonstrable teaching mediocrity — were in any way pretextual. The jury found no such pretext, as reflected in its response to Question No. 2 on the verdict form (Appendix G, p. 102a):

> Do you find by a preponderance of the evidence that Tulane also had a legitimate, non-retaliatory motive for the denial of the 1997-98 pay raise?

The jury answered "Yes," concluding (1) that Tulane had not only articulated but indeed had proved a legitimate, non-retaliatory motive for the raise decision and (2) that Rubinstein had failed to demonstrate that the motive was pretextual. Based on those findings that the evidence amply supports, Tulane is entitled to a Rule 50 dismissal of Rubinstein's retaliation claim, because he failed to prove the pretext element of his burden of proof.

As this Court has recognized, despite a plaintiff's *prima facie* case, "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other nondiscriminatory reason for the employer's decision. . . ." *Reeves,* 120 S. Ct. at 2109. Because the record conclusively reveals Tulane's non-discriminatory reasons for denying Rubinstein a raise, defendants are entitled to a judgment as a matter of law dismissing his retaliation claim.

B. Rubinstein Did Not Prove "But For" Causation

The Fifth Circuit itself has further recently reaffirmed that a retaliation plaintiff under Title VII *must* prove that the adverse employment action would not have occurred "*but for*" his protected conduct. *Vadie v. Mississippi State University*, 218 F.3d 365, 374 (5th Cir. 2000); *Long v. Eastfield College*, 88 F.3d 300, 305, n.4 (5th Cir. 1996) (emphasis supplied), *citing*, *McDaniel, supra,* 770 F.2d at 1346; *see also Sherrod, supra,* 132 F.3d at 1122-23. This burden of proof is much more stringent than the plaintiff's burden to show the "causal link" element of a *prima facie* case by demonstrating that the alleged retaliation against a protected act was a cause or a motivating factor in the employer's salary decision. *Long*, 88 F.3d at 305 n.4. To prove the "ultimate issue" of unlawful retaliation, Rubinstein must prove that "pretext" masked Tulane's alleged retaliatory animus and that he would have received a raise in 1997-98 without the alleged retaliation. *See Vadie*, cited above; *Jack v. Texaco Research Center*, 743 F.2d 1129, 1130-31 (5th Cir. 1984).

As a matter of law, Rubinstein failed to carry this burden. As explained above, the jury found that Tulane had a legitimate, non-retaliatory reason for denying Rubinstein a

pay raise for the relevant year. Tulane wanted to correct salary inequities and reward meritorious teaching. Merit raises were unavailable in 1997-98 to Rubinstein, an associate professor with an above-average salary and a poor teaching record. Rubinstein cannot insulate himself from performance standards and obtain a raise by filing a retaliation claim. *See Travis v. Board of Regents of the University of Texas System*, 122 F.3d 259 (5th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998) (noting the significance in a retaliation case where, as here, a professor's credentials are the same before the filing of the charge and at the time of the employment decision at issue). "Title VII protection from retaliation for filing a complaint does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with his peers." *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8th Cir.), *cert. denied,* 488 U.S. 892 (1988).

The Fifth Circuit erroneously concluded that the jury found "but-for" causation through its negative response to Interrogatory No. 3: "Do you find by a preponderance of the evidence that Tulane would have made the same decision to deny Asher Rubinstein a raise despite the existence of a retaliatory motive?" *See* Appendix A, pp. 19a-20a. But that response has no support whatsoever in the evidence and affords Rubinstein no basis for recovery. Apart from the reversible errors discussed above that tainted the jury's finding, Rubinstein cannot prevail as a matter of law unless he proves that he would have received a raise in 1997-98 absent Tulane's alleged retaliation. As the court of appeals recognized in affirming summary judgment dismissing Rubinstein's claims concerning the earlier pay raise decisions, "Tulane's non-discriminatory purpose in denying

pay-raises based on Rubinstein's poor teaching skills is not rebutted . . . [and] Rubinstein has not established pretext as to this issue." *Id.* at 12a. Rubinstein likewise offered no evidence to challenge Tulane's legitimate raise guidelines in 1997-98 to bring underpaid professors up to average and to reward good teaching. As a well-paid associate professor with a poor teaching record, he was neither recommended for nor entitled to a raise that year.

Rubinstein likewise cannot dispute Tulane's longstanding stated policy concerning faculty promotions, which expressly provides that no faculty member with marginal proficiency in teaching will be judged favorably (R.2, 364). Moreover, in 1997-98 in particular, Tulane announced its specific aims for disbursing raises from the limited pool of funds to reward underpaid faculty members and good teachers. Rubinstein failed to meet either criterion that year, as the uncontroverted and independent documentary evidence of his existing salary and student evaluations readily show. Under these circumstances and the Rule 50 standards set forth in *Reeves*, no reasonable juror could conclude that Rubinstein proved that he would have received a raise in 1997-98 "but for" Tulane's alleged retaliation against him.

Citing *Long, supra*, the Fifth Circuit stated that "Rubinstein is correct that he does not have to prove that his 'protected conduct was the sole factor in motivating [Tulane's] challenged decision.' " *See* Appendix A, p. 19a. But the court of appeals made that statement in *Long* in discussing the plaintiff's burden "to establish the 'causal link' element of a *prima facie* case." 88 F.3d at 305 n.4. On the ultimate issue, Tulane is permitted to have multiple reasons for its action, but Rubinstein can "prevail only by proving

that 'but for' the protected activity [he] would not have been subjected to the action of which [he] claims." *McDaniel, supra*, 770 F.2d at 1346, citing *Jack, supra*, 743 F.2d at 1131.

Even assuming that Dean Van Buskirk's innocuous remark in his deposition testimony that good colleagues should use grievance procedures of the University before suing were somehow "direct" evidence of discrimination, the objective evidence still shows that Rubinstein was not entitled to a raise in 1997-98 under Tulane's valid criteria because he had an above-average salary and a poor teaching record. Whether the issue is viewed as Rubinstein's ultimate burden of proof or as Tulane's affirmative defense, under the standards of *Price Waterhouse* no rational fact finder could conclude that Tulane would not have made the same decision to deny him a raise. When the Court reads the jury's responses to all three interrogatories in light of the evidence and the proper legal standards, it can only conclude that the evidence is insufficient to support Rubinstein's claim that he would have received a raise in 1997-98 "but for" the alleged retaliation.

III. The Award of Punitive Damages is Contrary to the Controlling Law and the Evidence

This case further presents an excellent opportunity for this Court to clarify the quality and quantity of proof necessary for recovery of punitive damages in a Title VII retaliation case. The standard for awarding punitive damages under the Civil Rights Act of 1991 requires that the employer must have acted "with malice or with reckless indifference to federally protected rights" of the plaintiff. 42 U.S.C. § 1981a(b)(1); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999) (issued subsequent to the trial of

this case). Although this statute "does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind," the "employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages." 527 U.S. at 534-36. Even intentional discrimination does not give rise to punitive damages where "the employer discriminates with the distinct belief that its discrimination is lawful." 527 U.S. at 536-37. As evidenced by the jury's finding that Tulane had a legitimate, non-pretextual motive for its decision, Rubinstein completely failed to prove that defendants acted either maliciously or with reckless indifference to his protected rights by denying him a raise that he never qualified for in the first place.

First, Rubinstein did not meet the valid criteria for a raise in 1997-98. Just as he cannot immunize himself from adverse action based on lawful performance standards by filing an EEOC complaint, he cannot recover punitive damages after Tulane denied him a raise for failing to meet those requirements. Any punitive damage award unjustly rewards Rubinstein and penalizes Tulane for following its own legitimate raise guidelines.

Second, Tulane applied its raise criteria fairly and did not unlawfully discriminate against Rubinstein. Michael Lynch, the Department Chair, recommended raises based on each faculty member's individual performance according to the valid criteria and stated his reasons for those recommendations in a memorandum to the Dean (Defendants' Exhibit 11). In not recommending any raise for Rubinstein in 1997-98, the Chair specifically noted Rubinstein's poor teaching performance based on student evaluations. *Id.* Both the Dean and the Chair unequivocally

denied any retaliatory motive against Rubinstein (Supp.R., 50, 88). Indeed, in the 1997-98 academic year, the only other Tulane engineering professor who had filed an EEOC charge and lawsuit alleging discrimination actually received a raise because his salary was below average (Supp.R., 88).

Third, there is no proof of defendants' malice or reckless indifference. The Fifth Circuit erroneously attempts to justify the jury's punitive damage finding by citing Dean Van Buskirk's deposition remark that Rubinstein "hauled colleagues into court to try to resolve differences." The court of appeals refers to that as evidence of "a healthy disdain for Rubinstein's rights to seek redress in the courts" that meets "the standard of reckless indifference at least, if not outright animus, towards those rights." *See* Appendix A, pp. 26a-27a. But, as noted above, the Dean explained that he was simply referring to Rubinstein's filing of a defamation suit against a fellow faculty member instead of using the University's grievance procedures. Moreover, even when it is viewed in a light most favorable to Rubinstein, nothing in the Dean's remark justifies a punitive damage award. Indeed, under the Fifth Circuit's circular reasoning, any employer who acted adversely to an employee who had exercised a protected right would be guilty of malice and reckless indifference. Punitive damages are not recoverable in every Title VII case, and nothing about this one rises to the level of knowing and intentional violation of federal law or warrants a punitive award in any amount no matter how reduced.

Moreover, even assuming that Tulane was not entitled to judgment as a matter of law on this record under the *Kolstad* standards, defendants should be granted a new trial on both liability and damages. This case was tried before

this Court rendered its decision in *Kolstad*, and Tulane should be allowed to present evidence of its good faith efforts to comply with Title VII as *Kolstad* allows. Further, as the Fifth Circuit recently held in another Title VII case, a jury's decision on a punitive damage claim is inseparably "intertwined with its view of the facts determining liability and its award of damages for emotional injury." *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 272 (5th Cir. 2000). Here, the jury awarded Rubinstein zero damages for emotional distress, and its verdict on liability resulted from the district court's erroneous mixed-motive analysis. If defendants were not entitled to a judgment as a matter of law dismissing Rubinstein's punitive damage claim, they should be granted a new trial on all issues in the case.

Furthermore, under the mixed-motive analysis that the trial court employed, Title VII prohibits Rubinstein from recovering punitive damages. Under 42 U.S.C. § 2000e-5(g)(2)(B), a successful Section 107 "mixed-motive" plaintiff under § 2000e-2(m), who would have been subject to the same employment action despite the discriminatory motive, is entitled to recover *only* declaratory relief, injunctive relief, attorney's fees, and costs attributable to that claim, but "[the court] shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, . . ." Thus, even assuming that § 2000e-2(m)'s mixed-motive analysis applied in this case, the jury's award of punitive damages and the district court's instatement of a 3.5% pay raise to Rubinstein clearly exceed the remedial scope of Section 107. This is not a punitive damage case, and the award should be struck in its entirety.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

G. PHILLIP SHULER
Counsel of Record
JULIE D. LIVAUDAIS
DOUGLAS L. GRUNDMEYER
RICHARD B. RAMIREZ
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.
Attorneys for Petitioners
1100 Poydras Street
Suite 2300
New Orleans, LA 70163-2300
(504) 585-7000